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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 201

FRANK KUCHIN, *Petitioner,*

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioner, Frank Kuchin, having recovered a jury's verdict and judgment of the United States District Court for the Northern District of Illinois in the sum of $37,500 on account of personal injuries that he sustained when he was struck by a protruding bar from defendant's railroad train while he was upon its right of way in a public street, having suffered reversal without remandment of that judgment and asserting that the Court of Appeals has so clearly evinced in this and many similar negligence cases a misconception of the functions of a Federal court of re-

view in such cases "as to call for an exercise of this Court's power of supervision," respectfully seeks this Court's writ of *certiorari* to review and reverse the judgment of the Court of Appeals for the Seventh Circuit in this case.

REFERENCE TO THE OPINIONS BELOW

The opinion of the Court of Appeals appears under the title *Kuchin* v. *Chicago and N.W. Ry. Co.*, 210 F. (2) 863 to 868. It is reprinted in full in the record at pages 202 through 209, inclusive.

The District Court rendered no written or oral opinion.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Court of Appeals was entered on January 12, 1954.

Petition for rehearing was denied on March 25, 1954.

The transcript of record was filed and the docket fee was paid within ninety days from March 25, 1954. This Court, through Mr. Chief Justice Warren, has enlarged the time for filing this petition to and including July 10, 1954, by order entered June 21, 1954. Hence this petition is timely.

This Court has jurisdiction to review the judgment in question under Section 1254 of the Judicial Code (Title 28, U.S.C.A., Sec. 1254).

THE QUESTION PRESENTED

The question presented is:

> The Court of Appeals accepted the jury's finding that the plaintiff, a pedestrian licensee in the defendant's right of way on a public thoroughfare, was struck by a protruding drawbar and seriously injured. It held, however, that the jury could not infer from the evidence summarized in the Statement of the Case that reasonable inspection would have prevented the plain-

tiff's injury and therefore set aside the jury's verdict without remandment. Does this holding, in the light of the evidence in this case and in the light of many other recent decisions of that Court in negligence cases, evince so basic a misconception of the functions of Federal appellate judicature as to elicit *certiorari* and evoke reversal?

STATEMENT OF THE CASE

Petitioner filed his complaint in the Circuit Court of Lake County, Illinois, seeking damages as the result of injuries sustained by him on May 30, 1951 (R. 1-2).

The defendant removed the cause to the United States District Court for the Northern District, Eastern Division, Illinois, on the sole basis of the diversity of citizenship between the parties and the presence of the requisite jurisdictional amount (R. 2, 3).

Trial before a jury was had. There was a verdict and judgment for $37,500.00 (R. 129-131). The jury returned two special interrogatories finding:

1. That the defendant negligently struck the plaintiff with an iron bar. (R. 130.)

2. That the plaintiff exercised ordinary care and caution for his own safety under the conditions shown by the evidence to have existed immediately prior to and at the time of the occurrence in question. (R. 130.)

The motions of defendant to enter judgment notwithstanding the verdict, in the alternative to set aside the jury's verdict and answer to the two special interrogatories, or, in the alternative to require a remittitur, were denied (R. 132). The Court of Appeals held that there was no evidence of negligence and reversed the judgment (*Opinion*, R. 204 to 208).

In narrating the evidence in the case, we shall confine ourselves so far as possible to the language of the opinion

of the Court of Appeals and all statements in quotations are from that opinion unless the contrary is indicated:

"The mishap occurred in Waukegan, Illinois, during the daylight hours on May 30, 1951. At the place involved the defendant's track runs in a northerly and southerly direction on property owned by the City of Waukegan known as Union Street. Though once dedicated to public use, and never vacated, the City Council in 1891 did grant to the Chicago and North Western and another railway company 'the right to lay down, maintain and operate in perpetuity two railroad tracks with necessary turnouts, side tracks and switches along and upon the westerly twenty four feet' of Union Street. This area is consequently not in fact used for public vehicular traffic. However, a cinder foot path, used for many years by the general public, is located roughly parallel to the defendant's track and about two feet from the east rail.

"The plaintiff, a man 66 years of age and in good health at the time, was walking south along the path just prior to the accident. The defendant's train, which consisted of ten box cars pushed by a diesel engine, approached the plaintiff from the rear as it proceeded in the same direction. The train had been made up in the defendant's Waukegan yard, which is north of the scene of the accident, and the cars were being shoved to a wire mill located about a mile and a quarter to the south.

"In response to a whistle the plaintiff looked around and first saw the train when it was about a block away. It was approaching at about ten miles an hour. The plaintiff then moved a foot or a foot and a half off the path to the east and onto the grass. He continued walking along the grass in this manner, and in a short time the lead end of the train overtook him. As the train was passing him his right arm was about two feet away from the sides of the moving cars. Suddenly, according to the plaintiff, after six or seven cars had passed, something hit him in the back at a point just below the right shoulder blade. This caused him to fall and his right leg was thrown across the rail and run over by the wheels of a freight car.

"The plaintiff, although he had looked back at the train as it approached him, did not then see any protruding object. However, just as he fell, or immediately afterwards, he looked up and saw a 'piece of iron sticking out from somewhere.' He did not particularly identify this object, but it appeared to be 'a piece of bar or pipe, piece of rod or pipe, or something like that.' The plaintiff said that it stuck out from the side of the train about two feet, that it was an inch thick, dark in color, and extended from a point four and a half or five feet above the ground. He did not notice whether it had a handle." (R. 202-3.)

An inspection of the car the next day showed that

"a draft key was missing from one of the cars, but other than that no irregularity in any of the equipment was ever detected. However, at the trial there was introduced on the plaintiff's behalf evidence tending to show that a bleeder rod, which in appearance would correspond roughly to the object which the plaintiff described, may sometimes become disconnected and extend laterally from the side of a car." (R. 204.)

After stating that the evidence was uncontradicted that

"a draft key is not essential to the proper functioning of the coupler, and that its absence would not cause any other piece of the coupling machinery or equipment to project beyond the side of the car," (R. 204-5.)

and that it was error in submitting any issue to the jury arising out of the fact that a draft key was missing, the Court of Appeals continued:

"The plaintiff seems to rely principally on the theory that the object which struck him was a bleeder rod projecting from the side of one of the cars. This device is an iron rod about three-eighths of an inch in diameter. It is part of the air brake equipment, and it is connected by a cotter pin to a bleeder valve on the reservoir tank located beneath the car. It extends transversely from the tank to a point beneath the outside edge of the car, where it is supported by an eye bolt. The outer end of the bleeder rod is curved down

to form a handle. When in normal position the handle of the rod does not extend beyond the outside edge of the car.

"The plaintiff's expert witness, O'Hara, testified that in his experience as a railroad switchman it was a common thing to see bleeder rods that had become disconnected from the valve of the reservoir tank. He stated that this would permit the rod to slide through the eye bolt and project laterally beyond the outside of the car by as much as its own length. He explained that this may occur when the cotter pin which fastens the rod to the bleeder valve is broken or wears out because of vibration, rust, or natural deterioration. The witness further testified that this cotter pin normally will last for a year. He stated that a specific inspection of the cotter pin is necessary to determine whether it is in danger of coming loose. He said that such inspections are made at least once a year by the car department and that between such inspections there might be a defect in the cotter pin which a train crew could not determine.

"It is the plaintiff's contention that the jury here could infer that a bleeder rod on one of the cars had come loose, that it then protruded beyond the side of the car, and that it struck the plaintiff. We assume this to be the fact. Having done so, however, we are yet impelled to hold that there is nothing in the record from which the jury could properly find negligence on the part of the railroad." (R. 205-206).

The essence of the holding of the Court of Appeals is expressed in the following two paragraphs:

"We need not consider whether the plaintiff here could properly invoke the doctrine of *res ipsa loquitur*. He has not only introduced expert testimony tending to show the precise cause of the injury, which precludes the application of that doctrine, see *Omaha Packing Co.* v. *Pittsburgh F.W. & Ry. Co.*, 7 Cir., 120 F. 2d 594, but he has also expressly declined to rely on that doctrine. Therefore, it is not sufficient, to make a prima facie case, for the plaintiff merely to show that he was struck by a bleeder rod extending laterally from one of the defendant's cars. It was

incumbent upon the plaintiff to introduce further evidence from which the jury might reasonably have inferred that responsibility for this condition lay in the defendant's negligence.

"We have assumed that from the testimony of O'Hara and from other evidence the jury could infer that the plaintiff was struck by a bleeder rod which had become disconnected by reason of a defective cotter pin. The jury could also infer that a specific inspection of the cotter pin is necessary to ascertain its condition. Finally, it could infer that the pin normally will last for about a year. But we are at a loss to see how, from these premises, the jury in this case could properly conclude that the defendant was guilty of actionable negligence. The plaintiff introduced no evidence whatever relating to the care exercised by the defendant to keep the machinery in good order. There is not the slightest indication of the frequency with which routine inspections were made, or of how long before the mishap this equipment was last inspected. (We note that O'Hara, who stated that inspections of air brakes 'are made at least once a year,' necessarily spoke from his experience as an employee of the Chicago Great Western railroad which, so far as the record shows, has no connection whatever with the defendant in this case.) Nothing, in short, appears from which it might be inferred that the defendant knew or reasonably should have known that the cotter pin was defective. Under the circumstances, evidence relating to these matters was indispensable to entitle the plaintiff to submission of the question of negligence to the jury." (R. 206-7.)

The Court of Appeals did not advert to the following testimony in the record:

"The car was bad order in the yard before the inspection. The car was being used at the time of the occurrence. Bad order conveys the idea that the car should be fixed. When a car is bad order, you take it out of the train and pull it out of service." (R. 77.)

It will be observed that the core of the holding of the Court of Appeals is in this language:

> "There is not the slightest indication of the frequency with which routine inspections were made, or of how long before the mishap this equipment was last inspected. . . . Under the circumstances, evidence relating to these matters was indispensable to entitle the plaintiff to submission of the question of negligence to the jury." (R. 207).

But evidence "of the frequency with which routine inspections were made, or of how long before the mishap this equipment was last inspected", *was evidence exclusively within the possession of the respondent.* It being conceded that protrusion of bleeder rods may occur when "the bleeder valve is broken or wears out because of vibration, rust, or natural deterioration" and that these defects are discernible upon inspection, petitioner contended below and contends here that the jury might properly infer from the absence of evidence forthcoming from respondent that no adequate inspection had been made. Rejection of this contention by the Court of Appeals raises, we submit, a most important question as to burden of proof in negligence cases tried in Federal courts.

REASONS RELIED ON FOR THE GRANTING OF THE WRIT AND ARGUMENT AMPLIFYING THOSE REASONS

Mindful that this Court almost never grants writs of *certiorari* unless the case presents questions of exceptional moment to the national jurisprudence, we respectfully suggest the following considerations as demonstrating that the importance of this case far transcends that of the interests of the immediate parties litigant therein:

The authors of this brief have made a statistical canvass of cases involving personal injury and death decided by the Court of Appeals for the Seventh Circuit from January of 1950 through those reported in Volume 197 of the Federal Reporter, Second Series.

In twenty-six of these cases, the Court of Appeals has reversed judgments for plaintiffs upon the theory that there was not sufficient evidence of negligence to take the

case to the jury. These cases are: *Cox* v. *Kroger*, 179 F. 2d 382; *Swigart* v. *C. & N. W. Ry. Co.*, 180 F. 2d 177; *Hoff* v. *Donaldson*, 184 F. 2d 419; *Wendell* v. *C., R.I. & P. R.R. Co.*, 184 F. 2d 868; *Billman* v. *Kroger*, 185 F. 2d 120; *O'Keefe* v. *Wabash R.R. Co.*, 185 F. 2d 241; *Reynolds* v. *B. & O. R.R. Co.*, 185 F. 2d 27; *Heller* v. *Select Lake City Theater Co.*, 187 F. 2d 649; *Hill* v. *Railway Express Agency*, 187 F. 2d 184; *Desper* v. *Starved Rock Ferry Co.*, 188 F. 2d 177; *Quirk* v. *N.Y., Chicago. & St. L. Ry. Co.*, 189 F. 2d 97; *Ackermann* v. *Hicks*, 193 F. 2d 345; *Ernst* v. *Jewel Tea Co.*, 197 F. 2d 88; *McGunegill* v. *C. & O. R.R. Co.*, 199 F. 2d 302; *Guffey* v. *Havey*, 201 F. 2d 501; *Reilly* v. *C. & N.W. Ry Co.*, 201 F. 2d 473; *Spikings* v. *Wabash Ry. Co.*, 201 F. 2d 492; *Fiedler* v. *C. & N.W. Ry. Co.*, 204 F. 2d 515; *Schroeder* v. *Minneapolis, St. P. & S.S. M. R.R. Co.*, 204 F. 2d 758; *Wetherbee* v. *E. J. & E. Railroad Co.*, 204 F. 2d 755; *Petermichl* v. *C. & N.W. R.R. Co.*, 205 F. 2d 434; *Repshodt* v. *United States*, 205 F. 2d 852; *Barrett* v. *C. & N.W. Ry. Co.*, 207 F. 2d 5; *Wadiak* v. *Illinois Central R.R. Co.*, 208 F. 2d 925; *Koch* v. *C. & N.W. Ry. Co.*, 208 F. 2d 152; *Stevens* v. *Sears Roebuck Co.*, 211 F. 2d 260.

We have found only four cases in which judgments for plaintiffs were affirmed. These cases are *Fritz* v. *Penn. R.R. Co.*, 185 F. 2d 31, *O'Donnell* v. *E. J. & E. Railroad Co.*, 193 F. 2d 349. *Sivert* v. *Penn. R.R. Co.*, 197 F. 2d 371 and *Nattens* v. *Grolier Society*, 195 F. 2d 449.

In one of these cases, *Wetherbee* v. *E. J. & E. R.R. Co.*, 191 F. 2d 302, where the judgment under the Federal Employers' Liability Act was $50,000 for the death of a man 40 years old, with a life expectancy of 28.18 years and present value of further earnings would be $88,650.00, who left a widow and four children, the court thus expressed its attitude toward what it deemed high verdicts in personal injury cases:

> "The way the amounts awarded in verdicts in personal injury cases have been rapidly increasing is a matter of concern to all who are interested in a fair and orderly administration of justice. If the amounts

awarded in the next decade keep pace with the rate at which they increased in the last decade, in certain areas at least, verdicts of $150,000, $200,000, $250,000 or even greater sums may be expected. Even allowing for the decreased purchasing power of the dollar, many of the recent large awards for damages are not justified." (p. 309.)

In Illinois, courts of review manifest a different attitude. In *Smith* v. *I. C. R.R. Co.*, 343 Ill. App. 593, 99 N.E. 2d 717, the appellate court affirmed a judgment of $185,000 for personal injuries. Leave to appeal was denied.

Indeed, as far back as 1926, a judgment of $75,000 was affirmed in *Princell* v. *Pickwick Grayhound Lines*, 262 Ill. App. 298. Likewise, see *Schneiderman* v. *Interstate*, 331 Ill. App. 143, 72 N.E. 2d 705, wherein a verdict for $100,000 was affirmed.

Indeed, in the State courts settlements are made for substantial sums. Thus, in *Martinez* v. *Chicago & N.W. Ry. Co.*, Superior Court of Cook County, No. 51S-9284, wherein a 43 year old section laborer lost both legs well up to his hip joints, the case was settled, after seven days of trial, for $145,000.

Other circuits, following this Court's pronouncement as to the function of the jury in negligence cases in *Fairmont Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, manifest a different attitude toward the jury's function in personal injury cases. Cf. *Kieffer* v. *Blue Seal Chemical Co.*, 107 F. Supp. 288, affirmed 196 F. 2d 614, in which the Second circuit sustained a verdict in the sum of $250,000.

In *Zermani* v. *N.Y., N. Haven & Hartford R.R. Co.*, 200 F. 2d 240, the Court of Appeals for the First Circuit affirmed a verdict for $141,500 in a death case under the Federal Employers' Liability Act.

But in *Flener* v. *L. & N. R.R. Co.*, 198 F. 2d 77, where a plaintiff obtained a verdict of $7500 for a fractured vertebra, loss of three teeth, five months' hospitalization, months in a plaster cast and brace and commitment to a state hospital for the mentally ill for a period of five

months, the Court of Appeals for the Seventh Circuit refused to set aside the verdict as inadequate although the contention made was not that the Court of Appeals should weigh the evidence but prejudicial misconduct on the part of counsel trying the case below.

Turning to the four cases in which the Court of Appeals for the Seventh Circuit has affirmed verdicts for the plaintiffs in the last four years, it should be noted that in one of those cases, *O'Donnell* v. *E. J. & E. R.R. Co.*, 193 F. 2d 349, this Court reversed the original judgment in the Seventh Circuit and upon remand, the judgment was affirmed with expressions of reluctance.

Lawyers and district judges in the Seventh Circuit are unable to reconcile the tenor and trend of the decisions of the Court of Appeals for the Seventh Circuit with those for other Federal circuits and the State courts. Plaintiffs stand far less chance of sustaining a verdict and judgment in that court than in other courts.

We earnestly submit that the foregoing statistical considerations show the Court of Appeals to be prepossessed by a fundamental misconception of the function of Federal courts of review in personal injury cases tried by a jury.

The instant case is a vivid illustration of that misconception.

The facts in the instant case are extremely simple and may thus be distilled to their essence in a short paragraph:

> The plaintiff, a pedestrian licensee traversing the defendant's right of way in a public thoroughfare, was struck by a protruding bleeder rod and seriously injured. It is the custom elsewhere than on the defendant's railroad to inspect bleeder rods and the mechanism appurtenant to them at least once a year. Properly adjusted bleeder rods do not protrude from cars but it is common for improperly adjusted bleeder rods so to protrude.

From these facts the jury inferred negligence. That inference was the simple and logical conclusion that if inspection will disclose defects in the appurtenances to bleeder rods and if defective bleeder rod protrudes and strikes a person, negligence inheres in the failure to exercise reasonable inspection and discernment of the defect.

The Court of Appeals intimates that had the plaintiff relied upon the maximum of *res ipsa loquitur* he might have recovered. But the opinion says that because he disclaimed reliance upon that Latin phrase and introduced expert testimony as to how bleeder rods operated when inspected and how they were likely to operate when not inspected, he "waived" any right to recover under the doctrine of *res ipsa loquitur*.

In the first place, this is not the Illinois law. In the second place, even if it were the Illinois law, the maxim of *res ipsa loquitur* is at most a rule of evidence in the Federal courts, a plaintiff is entitled to recovery if his case meets the Federal standards of evidence or if it meets the State standards of evidence.

In *Lindroth* v. *Walgreen Company*, 407 Ill. 121, 94 N.E. 2d 847, the Illinois Supreme Court adopted the language of this Court in the classical case of *Lavender* v. *Kurn*, 327 U.S. 645. In the *Lindroth* case, the Illinois Supreme Court quoted the following passage from that case:

> " 'Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference.' " (p. 133.)

A very similar factual situation is found in *Howard* v. *Chicago & Alton R. Co.*, 179 Ill. App. 380. There the Court held the following to constitute a fact issue, saying at page 384:

"Three important facts are fully established, namely, that appellee was seriously injured while attending to his duties as gate keeper; that he was injured by a blow pipe thrown from this engine or train of appellant, and that appellee had nothing whatever to do with the operation of either the engine or train."

Whether the prima facie case is rebutted becomes a question for the jury. See *I.C. R.R. Co.* v. *Bailey,* 222 Ill. 480, 70 N.E. 833, *Chicago City Ry.* v. *Pural,* 224 Ill. 324, 79 N.E. 686. Nor did the fact that the plaintiff introduced expert testimony or state that he was not relying upon *res ipsa loquitur* change the legal effect of this rule of evidence. The expert testimony involved had only to do with an explanation of the parts of a car and specifically those parts which protrude from the side of the car.

Indeed, the Illinois court has held that where the plaintiff's attempt to prove an allegation of specific negligence failed, but the evidence established the elements supporting the presumption of negligence under *res ipsa loquitur* in a charge of general negligence, a case would still go to the jury on a general negligence count. (*William Wrigley, Jr. Co.* v. *Standard Roofing Co.,* 325 Ill. App. 210, 59 N.E. 2d 510.)

The Court of Appeals relied upon *C. & E.I. R.R. Co.* v. *Reilly,* 212 Ill. 506, 72 N.E. 454, for support of its present opinion.

That case is not in point.

There the plaintiff was struck by a piece of timber from a loaded railroad car. The complaint charged that the car in question was negligently loaded and further that the car was operated in a dangerous condition, of which the defendant knew or ought to have known. The plaintiff introduced no evidence of negligent loading so that the first charge failed. There was likewise no evidence of knowledge to sustain the second charge of the position of the scantling.

In the instant case we are confronted with a part of the car itself, which is supposed to be inspected before it sets out on its run. That it was not inspected is demonstrated by the fact that it was bad order when it left the yard. As Chief Justice Marshall said long ago:

> "It is a general rule as expressly recognized by the courts, that the positive authority of a decision is co-extensive only with the facts upon which it is made." (Chief Justice Marshall in *Ogden* v. *Sanders*, 12 Wheat. 332.)

This opinion is demonstrative of what litigants in the Court of Appeals for the 7th Circuit experience. The Court consistently misapprehends the law of Illinois, as enunciated by the Supreme Court.

A most astonishing instance of the failure of the Court of Appeals for the Seventh Circuit to appreciate the principles of circumstantial evidence embodied in the doctrine of *res ipsa loquitur* occurs in that Court's very recent decision in *Wadiak* v. *Illinois Cent. R. Co.*, 208 F. 2d 925. In that case a railroad employee subject to the Federal Employers' Liability Act had been injured by the shifting of a load in a freight car. The Court said at page 928:

> "*If the doctrine of res ipsa loquitur is ever applicable to litigation arising under the Act*, it certainly can not be applied in this case, where the negligence, if any, may be chargeable to the loader or to any of the other carriers who handle the car." (Emphasis supplied.)

The mere fact that the Court of Appeals for the Seventh Circuit should intimate doubt as to whether the doctrine of *res ipsa loquitur* can "ever" be applicable to suits under the Federal Employers' Liability Act demonstrates completely that Court's entire misconception of the doctrine. The doctrine is simply the principle that where the means of the sole instrumentality that occasioned an injury is in the exclusive control of the defendant and where the injury would not have occurred had the instrumentality

been carefully inspected and operated, the defendant must reject the influence of negligence or suffer an inference of liability. Why this doctrine should not be applicable to cases under the Federal Employers' Liability Act, where the common law of negligence furnishes the basis of liability, we can not say or see. Incidentally, in the *Wadiak* case the Court overlooked the rule that it was the duty of the defendant to use reasonable care to furnish the plaintiff a safe place to work and that this duty was not discharged by failing to remedy dangerous conditions that might have been due to the negligence of others than the railroad itself when the conditions creating the hazard were obvious to the plaintiff's fellow workers, contributory negligence, if any, not being a defense under the Act.

The *Wadiak* case is important in the instant case because it demonstrates that unless this Court exercises its power of supervision, injured plaintiffs in the Seventh Circuit, whether they sue under State or Federal law, can not hope for the same measure of consideration as is received by litigants in other circuits and in State courts on questions of circumstantial evidence, in personal injury cases.

Further illustrative of the attitude of the Court of Appeals for the Seventh Circuit toward personal injury cases is to be found in *Tisneros* v. *Chicago and North Western Ry. Co.*, 197 F. 2d 466, where the Court of Appeals held a defective engine not "in use on the line" as a matter of law although it was detained only temporarily in a roundhouse before resuming a schedule run.

We submit that the Court of Appeals has committed in this case two errors of sufficient gravity to elicit *certiorari:*

The first of these errors consisted in a holding that a jury might not rationally find negligence from evidence (1) that bleeder rods defectively positioned because of rust, wear or other factors discernible on reasonable inspection frequently protrude beyond the side of the train, and (2) that reasonable inspection will disclose the defects causing this protrusion. This error demonstrates that the Court

of Appeals labors under a basic misapprehension as to the scope of appellate review in negligence cases tried by a jury. This error was compounded and magnified by the consideration that all of the evidence concerning the frequency, character and results of inspection of this bleeder rod in particular and of bleeder rods on the respondent's railroad in general was in the exclusive possession of the defendant. Yet the Court of Appeals reversed because the *plaintiff* did not produce this evidence.

The second of these errors is its holding that because the plaintiff did not invoke the rule of *res ipsa loquitur* by name, that rule, which is only a principle of circumstantial evidence, was "waived" and that therefore the plaintiff was not entitled to the benefit of inferences drawn from the physical facts as shown by the evidence and from the absence of evidence that was exclusively within the control of the respondent. This error likewise embodies a misconception of federal jurisprudence so basic as to call for review by this Court.

PRAYER FOR WRIT OF CERTIORARI

WHEREFORE, petitioner prays this Court's writ of *certiorari* to review and reverse the judgment of the Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

JAMES A. DOOLEY
Attorney for Petitioner.

July, 1954.

APPENDIX

Judgment of the United States Court of Appeals For the Seventh Circuit

And on the same day, to-wit: On the twelfth day of January, 1954, the following further proceedings were had and entered of record, to-wit:

Tuesday, January 12, 1954.

Before:

Hon. J. Earl Major, Chief Judge.
Hon. F. Ryan Duffy, Circuit Judge.
Hon. H. Nathan Swaim, Circuit Judge.

No. 10942

Frank Kuchin, *Plaintiff-Appellee,*

vs.

Chicago and North Western Railway Company, *Defendant-Appellant*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof: It is ordered and adjudged by this Court that the Judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed, with costs; and that this cause be, and the same is hereby, Remanded to the said District Court with instructions to enter Judgment for the defendant.